REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 327 OF 2012

REGINA WAITHIRA MWANGI GITAU

(SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF

SAMUEL KAMAU MWANGI (DECEASED)…….APPELLANT

VERSUS

BONIFACE NTHENGE…….…….. RESPONDENT

JUDGMENT

This appeal arises from the ruling and order of the Principal Magistrate the Honourable Mr P.Nditika at Nairobi Milimani CMCC No. 1695 of 2009 delivered /made on 28th may 2012.

The appellant Regina Waithira Mwangi Gitau suing as the personal representative of the estate of Samuel Kamau Mwangi deceased was not a party to the proceedings in the lower court. One Joseph Mwangi Gitau was the plaintiff who had sued Boniface Nthenge the respondent herein for general damages as well as special damages arising from the fatal road traffic accident involving the deceased Samuel Kamau Mwangi and the defendant/respondent's motor vehicle registration number KBS 159V which is alleged to have lost control along Mombasa –Nairobi road at Mlolongo, and veered off the road thereby violently knocking the deceased who was lawfully at his place of work as a mechanic as a result of which he sustained fatal injuries.

The suit was instituted on 23rd March 2009 vide a plaint dated 17th march 2009. The defendant /respondent Bonface Nthenge entered an appearance on 14th April 2009 and filed his defence on 17th April 2009 denying the claim and pleading contributory negligence on the part of the deceased and fraud on the part of the plaintiff. Joseph Mwangi Gitau. On 30th April 2009 the plaintiff did file a reply to defence reiterating the contents of the plaint and denying particulars of contributory negligence and or fraud pleaded by the defendant.

By 24th February, 2012, the suit had not been heard or determined and by an application dated 8th February 2012 made in the subordinate court, the plaintiff's advocates B.W. Kamunge & Company Advocates fileld a Notice of Motion dated 8th February 2012 seeking orders:-

1. That the plaintiff's (deceased's) suit be revived as it has abated.
2. That the plaintiff Joseph Mwangi Gitau (deceased) be substituted with Regina Waithira Mwangi the legal representative of the deceased's estate.
3. That the costs of this application be in the cause.

The application was premised on the grounds that:-

a. The plaintiff died on 16th June 2010 and her suit had since abated hence the application to revive the suit.
b. Regina Waithira Mwangi had obtained a grant of letters of administration for the estate of the plaintiff (deceased) and desires to proceed with the deceased's plaintiff's suit.

The said application was further supported by the affidavit sworn on 8th February 2012 by Benson Wainaina Kamunge advocate having the conduct of the matter on behalf of the plaintiff/applicant. He annexed copy of death certificate for the deceased plaintiff Joseph Mwangi Gitau, a letter from the chief of Gaichanjiru location identifying the applicant as the widow of the deceased Joseph Mwangi Gitau, who was also the father to the deceased Samuel Kamau Mwangi; a limited grant of letters of administration in favour of Regina Waithira Mwangi the applicant and a copy of draft amended plaint.

Mr Kamunge deposed that it was necessary to substitute the deceased with the applicant who was also the mother to the original deceased Samuel Kamau Mwangi and have the suit revived as it had abated following the demise of the original plaintiff.

The respondent/defendant opposed the said application and filed a replying affidavit sworn on 29th March 2012 contending that the delay in filing the application was inexcusable as the applicant had obtained grant of letters of administration ad litem on 7th December 2010. He also deposed that the affidavit supporting the application was defective hence the same should be expunged from the records and that the application was frivolous vexatious and an abuse of the court process hence it merits no consideration.

In her skeletal submissions filed on her behalf by her advocate, the applicant through Mr Kamunge submitted that the delay in filing the application was caused by misfiling of their file and they could not trace it until late. Further that there would be no prejudice to the defence case and the delay occasioned could be compensated by way of costs which the applicant was willing to bear. He also relied on Section 3A of the Civil Procedure Act and the enabling provision of the law. That it was only fair that the court exercises its discretion on favour of the applicant so as to allow the suit to proceed to full hearing on merits. The record shows that the defendant was on 23rd March 2012 granted leave to file further affidavit but none is on the court file or record of appeal.

In his submissions filed on 30th April 2012 the defendant's counsel Morara Apiemi & Nyangito Advocates submitted that the suit against his client had abated and therefore the application dated 8th February 2012 seeking to revive it had no merit and the same was defective for reasons that it had been brought after one year and under the provisions Order24 Rules 1,2 and 3 of the Civil Procedure Rules . Further, that the applicant had cited wrong enabling provisions of the law instead of Order 24 Rule of the Civil Procedures Rules citing ***M. Mboroki Marangacha vs Land Adjudication Officer Nyambene & 2 Others (2005) e KLR*** that***" there is no suit before the court into which the applicant as a legal representative of the exparte application can be joined" and that " the application was brought under a nonexistent suit without which the application makes little sense……"***

It was also submitted that there was no explanation or sufficient cause stated for the delay in bringing the application as required under Order 24 Rule 7 (2) of the Civil Procedure Rules. The defendant attacked the allegation that the applicant lived in Nairobi and was not aware of the accident involving the deceased who was her son, which he considered absurd and untruthful since she had even obtained the grant on 7th December 2010 before the suit abated. He relied on **Gerphas Alphonse Odhiambo vs Felix Adiego (2006) e KLR** that ***" the period of delay however short must go in tandem with the explanation for it".***

The defendant also submitted that the application was also defective because the supporting affidavit was sworn by her advocate Mr Kamunge on matters which only the applicant could be cross

examined. He relied on the Gerphas Alphonse Odhiambo (supra) case where the court disregarded an affidavit sworn by the advocate on behalf of his client who was available to swear to prove the facts of their own knowledge.

He prayed that the application be dismissed with costs.

In his brief ruling Hnonourable P. Ndikita, Principal Magistrate dismissed the application for revival of suit and or substitution of the applicant/appellant herein on the grounds that the application was supported by an affidavit sworn by her counsel in the conduct of suit. He relied on the decision of **Gerphas Alphonse Odhiambo (supra).** He also found that the application was brought late yet the applicant lived in Nairobi and being close to the deceased, she could not purport to state that she learnt of the death of the deceased late. the trial magistrate considered that the case had been hanging on the defendants since 2009 hence the defendant would be prejudiced if the application was allowed.

It is that ruling and order of dismissal that provoked this appeal.

The appellant's memorandum of appeal sets out grounds of appeal namely:

1. The learned Principal Magistrate erred in law and in fact in dismissing the plaintiff's/appellant's application dated 8th February 2012 without giving regard to the principle of substantive justice.
2. The Learned Principal Magistrate erred in law and in fact in failing to consider the appellant's written submissions on the application.

She prayed that the appeal be allowed, with costs and an order that the ruling of the lower court be set aside and or varied and direct that the plaintiff's suit in the lower court be revived and substitution be allowed.

The appeal was admitted to hearing on 19th May 2014 and directions given on 12th June 2014.

When the parties appeared before me on 12th November 2014 they agreed to dispose of the appeal by way of written submissions and the matter was slated for mention on 18th December 2014 to confirm compliance within 14 days from 12th November 2014. By 18th December 2014 only the appellant had filed written submissions. The respondent did not attend court and neither did he file any submissions hence I set the matter for delivery of judgment for 13th April 2015 which date reached when I was engaged in a training at the Judicial Training Institute for the new judges hence the delay in delivering this judgment.

However, as I was preparing to write this judgment, the respondent's written submissions were brought to my chambers headed " APPELLANT'S written submissions" signed by Morara Apiemi & Nyangito Advocates for the respondent. The same were filed on 16th December 2014 but not placed on the court file. I have nonetheless examined and considered the said submissions though filed out of the 14 days given, since the appellant did not file an affidavit of service showing when their submissions were served on the respondent's counsel.

In the written submission filed by the appellant on 28th November 2014, the applicant gives a background of the matter giving rise to the suit and the application.

In support of the two grounds of appeal, the appellant's counsel submitted that the magistrate was wrong on principles of the law in striking out the plaintiff's affidavit. He relied on **Jane Jaoko Owino vs Blue Shield Insurance Co. Ltd HCC 359/2000** where Justice Tanui J held that:

" An affidavit sworn by an advocate on matters which are not in dispute and supported by the court record is not defective……."

In his view, the trial magistrate misinterpreted Order 19 Rule 3(1) of the Civil Procedure Rules which provide that ***" affidavits shall be confined to such facts as the deponent is able of this own knowledge to prove."***

Further, that the matters before the trial magistrate were fairly simple such as whether the plaintiff was deceased, whether the suit had abated hence the need to apply for revival of the suit, which matters were within the personal knowledge of the advocate seized of the plaintiff's case as shown by death certificate, among other documents. That the defendant stood to suffer no prejudice since no legal right accrued in the matter as the plaintiff's suit was yet to be heard and determined, which prejudice if any could be compensated by way of costs if the suit was revived to proceed to full hearing on the merits. The appellant further relied on the case of **V.K. Construction Co. Ltd vs Mpata Investment Ltd HCC 257/2003** where Honourable Ringera J pronounced himself thus:

> ***" ……..the jurisdiction to strike out pleadings is to be exercised cautiously and sparingly and only where the cause of action is so obviously bad and almost incontestably bad. For the remedy is a draconian one and where life can be injected in the plaint by an amendment the plaintiff should be given a chance to do so" that further the discretion of the court in such a scenario is unfettered and the learned magistrate should have exercised that discretion in favour of the plaintiffs/applicant and failure to revive the suit occasioned a traversity of justice.***

Mr Kamunge advocate for the appellant further submitted that the trial magistrate erred in finding that the application was made late yet the deceased died on 16th June 2010 and the application was made on 24th February 2012. He relied on **Soni vs Moan Dairy CA 13/1967 (1968) EA 58** where Duffs JA stated :

> ***" ……the period of limitation for an application by a plaintiff under Order 23 Rule 8(2) now (Order 24 Rule 8(2) ……for an order reviving a suit is given by Article 178 of the Indian Limitation Act 1877 and is three years from date of abatement of the suit……..:"***

In his view, the application was filed within time hence the magistrate was wrong in holding that the application was filed after the lapse of time.

In his written submissions dated and filed on 16th December 2012, the respondent submitted that the appeal lacks merit for the reasons that:

(a) the supporting affidavit to the application was defective as advocates should not depose of facts which only parties can prove and that if counsel swears an affidavit, he descends into the arena of the litigants by purporting to be a witness especially on matters of fact, which practice has been frowned upon by courts over time. He referred to paragraph 8 of the affidavit of Kamunge advocate which he alleged purported to explain the circumstances that prevented the appellant from filing the necessary application in time, posing the question:-supposing the respondent had wanted to cross examine the deponent on matters regarding where she lived, when she knew about the plaintiffs(her husband's death), when she knew about the suit, etc, would the advocate be in a position to respond thereto? His answer is " clearly not;" and that it would have been embarrassing for counsel to step from the bar into the witness box hence the trial magistrate was right in striking out the affidavit. Further, that nothing prevented the appellant to swear the affidavit and explain the delay herself. He relied on the **Gerphas Alphonse Odhiambo (supra)** case where Waki JA disregarded the affidavit sworn by an advocate on behalf of this client who was available to swear and prove the facts of his own knowledge.

On the delay in bringing the application, the respondent submitted that the appellant had not explained the delay since she got the chief's letter on 28th July 2010 recommending her to be substituted in the place of her deceased husband/plaintiff and even obtained a limited grant within one year of his demise but it took her nearly 2 years to file the application for substitution and revival of suit.

In the respondent's view, the appellant was lying when she stated through her advocate that she lived in Nairobi and did not know of the plaintiff's accident (sic) until very much later on hence the appeal should be dismissed with costs.

I have carefully considered the appeal herein, the application by the appellant before the subordinate court, the respective parties submissions before that court, authorities relied on both in the lower court and in this appeal, and the submissions by the appellant in support of this appeal as well as the opposing submissions by the respondent. I have also considered the applicable law and precedents relevant to the matter. This being the first appellate court, this court is obliged under section 78 of the Civil Procedure Act to reevaluate, reassess and reconsider the matter before the lower court in the exercise of its powers as those of the trial court and arrive at its own independent conclusion, and that is exactly what this court has done in this case.

Two issues emerge for determination

1. Whether an advocate can swear an affidavit on behalf of his client and therefore whether the supporting affidavit by Kamunge advocate is sustainable in law.
2. Whether the appellant's application I the lower court had merit.

On issue number one, the established principle of law is that advocates should not enter into the arena of the dispute by swearing affidavit on contentious matters of fact. By swearing an affidavit on contentious issues, an advocate thus makes himself a viable witness for cross examination on the case which he is handling merely as an agent which practice is irregular. In **Simon Isaac Ngugi vs Overseas Courier Services (K) Ltd 1998 e KLR and Kisya Investments Ltd & Others vs Kenya Finance Corporation Ltd**, it was held that .

"…….it is not competent for a party's advocate to depose to evidentiary fact at any stage of the suit".

In addition, Rule 9 of the Advocates Practice Rules prohibit advocates from appearing as an advocate in a case wherein he might be required to give evidence either by affidavit or even orally. By swearing an affidavit on behalf of his client where issues are contentious, an advocate's affidavit creates a legal muddle with untold consequences.

However, where an affidavit by an advocate raises issues of law and fact which are within his knowledge having been an advocate handling the suit on behalf of the party on whose behalf the affidavit is sworn there is absolutely no mistake or error in the affidavit that can render it defective.

Examining the ruling of Honorable Nditika Principal Magistrate made 28th May 2012, I can't help but fault the trial magistrate for striking out the supporting affidavit of Benson Kamunge advocate. The trial magistrate did not lay any basis whether legal or factual, for striking out the said affidavit. He simply stated:-

"I have considered the affidavits and submissions. I do note that the plaintiff's affidavit is sworn by an advocate who is in conduct of the suit. In this respect I strike the affidavit as was held in the case of Gerphas Alphonse Odhiambo vs Felix Adiego (2006) KLR".

The trial magistrate did not make any reference to those paragraphs that he considered unsuitable to be sworn by the advocate and neither did he even set out the principle espoused in the **Gerphas Alphose Odhiambo** case. His ruling is as skeleton as I have reproduced above concerning the objection raised on the defective affidavit.

In my view, in as much as the trial magistrate in striking out the affidavit was exercising his discretion, that discretion must be exercised judiciously and a basis laid out. No basis was laid for striking out the entire affidavit.

There was no contention that the facts deposed to by the advocate could not have been within the advocate's knowledge, being the advocate having the personal conduct of the suit on behalf of the deceased plaintiff since its institution in 2009. In my view, therefore, the trial magistrate acted on wrong principles of law in striking out the advocate's affidavit.

Furthermore, there is not law expressly prohibiting an advocate from swearing an affidavit on behalf of his client in a client's cause, on matters which he as an advocate has personal knowledge of, whether informed by his client or arising from the proceedings in the cause.

Under Order 19 Rule 3 of the Civil Procedure Rules:

3(1) "affidavits shall be confirmed to such facts as the deponent is able of his own knowledge to prove."

The respondent did not, as I have stated above, demonstrate in the lower court that the said affidavit of Mr Kamunge advocate offended the best rule evidence of Order 19 Rule 3(1) above.

Further, it is not shown which of the specific matters contained in the said affidavit of Mr Kamunge advocate would require him to be cross examined on under Order 19 Rule 2 of the Civil Procedure Rules, thereby offending Rule 9 of the Advocates Practice Rules and or which of the matters deposed qualify as being scandalous, irrelevant or oppressive to warrant being struck out under Order 19 Rule 6 of the Civil Procedure Rules.

In addition, it was never contended that the affidavit of Mr Kamunge advocate contained arguments thereby being technically unsound.

The only serious objection by the respondent to the affidavit by Kamunge advocate has been raised in this appeal in the written submissions by the respondent, contending that if the respondent wanted to cross examine the appellant on paragraph 8 of the advocates affidavit, it would embarrass the advocate as he would not be in a position to answer questions on behalf of his client regarding where she lived, when she knew about the plaintiff's death, when she knew about the suit etc. In my view, that aspect should have been raised before the trial court for determination and in any event, that alone cannot form the basis for striking out the whole affidavit as the court below and even this court as the first appellate court has the power to strike out of the affidavit specific paragraphs that are irrelevant, scandalous and offensive, not the entire affidavit without providing sound reasons for so doing. It was also not contended that paragraph 8 of the advocate's affidavit was scandalous offensive or irrelevant.

Accordingly, I dismiss that argument by the respondent raised on appeal and not before the trial court which had the discretion to strike out that part of the affidavit that would be offensive but instead struck out the entire affidavit. Furthermore, as I have stated elsewhere in this judgment, the ruling by the trial magistrate was so scanty that one cannot discern that there were some submissions for and against the "defective" affidavit.

In my view, it was not sufficient for the trial magistrate to merely rely on the case of **Gerphas Alphonse Odhiambo** which, as at 28th May 2012 had been overtaken by the provisions of Sections 1A,1B of the Civil Procedure Act and Article 159 (2) (d) of the Constitution, besides other Court of Appeal decisions like **KCF Co.Ltd vs Richard Akuesera Onditi CA 329/2009.** In **Kamlesh M.A. Pattni – Vs – Nasir Ibrahim Ali & 2 Others CA 354/2004**, the Court of Appeal in dealing with a serious objection on the admissibility of an affidavit sworn by Senior Counsel Paul Muite held inter alia:

> ***"... There is otherwise no express prohibition against an advocate who, of his own knowledge can prove some facts, to state them in an affidavit on behalf of his client, so too an advocate who cannot readily find his client but has information the sources of which he can disclose and state the grounds for believing the information..."***

In other words, the mere fact that an affidavit was sworn by an advocate does not render it incurably

defective. See this court's decision in **HC Misc Application 621/2014 Factory Guards Ltd vs Abel Vundi Kitungi** on the same subject of an affidavit sworn by an advocate representing a party in the subject suit.

In my most considered view, the application before the trial magistrate was hinged on points of law namely, that where a party to a suit dies, he or she has to be substituted where the suit survives the deceased and secondly, where such suit has abated, then an application for revival must be made in the suit.

Mr Kamunge was clear in the affidavit that he was authorized by the applicant who was not yet a party to the suit, to swear the affidavit on her behalf and that he was conversant with the facts of the case. The fact of being instructed to file the suit by the deceased plaintiff and the fact that his instructing client had since died and one year had lapsed since his demise hence the suit abating are not matters which would fall outside the knowledge of an advocate who had had the personal conduct of the matter in question from its inception.

None of the matters of fact that were deposed by Mr Kamunge were seriously contested by the respondent and even if they were, this court is enjoined to do substantive justice for the parties as was stated in the case **of Kenya Commercial Finance Co. Ltd vs Richard Akuesera Onditi CA 329/2009** where the Court of Appeal held that:-

> **"In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking out the case. In applying the principle or concept of overriding objective , each case must be viewed on its own peculiar facts and circumstances and it would be a grave mistake for anyone to fail to comply with well settled procedures and when asked why, to simply wave before the court provisions of Section 3A and 3B of the Appellate Jurisdiction Act (equivalent of Section 1A and 1B of the Civil Procedure Act). The court still retains unqualified discretion to strike out a record of appeal or a notice of appeal; the only difference now is that the court has wide powers and will not automatically strike out, proceedings. The court, before striking out, will look at the available alternatives."**

In this case, I am enjoined to give effect to the overriding objective of Sections 1A and 1B of the Civil Procedure Act in the interpretation of its provisions and Rules which include:

1. Just determination of the proceedings.
2. Efficient disposal of the dispute.
3. Efficient use of available judicial and administrative resources, and the timely disposal of the proceedings and at a cost affordable to the respective parties.

In the Kamlesh Pattni case(supra), the Court of Appeal also held that instead of striking out the whole affidavit, it went ahead and struck out only those paragraphs in the affidavit of P. Muite (Senior Counsel) which were considered scandalous, oppressive and irrelevant.

The respondent's counsel submitted in the court below that the application was not only sensitive but also critical, and that the matters in issue could only be better explained by the applicant and on which her alone would be cross examined and that by an advocate swearing an affidavit, raises questions as to the applicants interest in the suit. Whereas I accept the principle espoused in Gerphas Alphose Odhiambo (supra) case by Honourable Waki JA, I also note the distinction and persuasiveness of that decision to this instant case by the careful words used by the learned judge where he stated. ***"…… Ordinarily, an affidavit should not be sworn by an advocate on behalf of his client or clerk when those persons are available to swear and prove the facts of their own knowledge. In appropriate cases, such affidavits may be struck out or given little or no weight at all……..I will disregard the affidavit in that regard."(emphasis added).***

I note that the learned judge was exercising his judicial discretion in a matter which was totally

different from the instant case. In this case, I am entitled to exercise the discretion in favour of the appellant, in the interest of justice, in a matter where I find that the issue being raised is one of procedural technicality in favour of substantive justice as contemplated by Article 159 (2) (d) of the Constitution, considering that the above decision was made before the effective date of Article 159(2) (d) and Section 1A and 1 B of the Civil Procedure Act.

For the above reasons, I allow the appeal and set aside the order striking out the supporting affidavit sworn by Benson Wainaina Kamunge on behalf of the applicant/appellant.

The second issue for determination is whether the application dated 8th February 2012 filed by the appellant in the lower court haD any merit. This court, as the first appellate court is empowered under Section 78 of the Civil Procedure Act to among others, rehear the application and arrive at its own conclusion , or remit it back to the trial court. In this case, I exercise my discretion to determine that application fully. Albeit the respondent submitted in the lower court that the application was brought under the wrong provisions of the law, that error in my view does not render that application defective and I dismiss that argument as baseless. The applicant is indeed expected to cite the correct provisions of the law but where she has either failed to cite or cited wrong provisions, that is a procedural technicality curable by Article 159 2 (d) of the Constitution , Section 1A and 1 B of the Civil Procedure Act and order **Order 51 rule 10** which reads:

"51. 10. (1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.

(2) No application shall be defeated on a technicality or for want of form that does not effect the substance of the application."

The above provisions are self explanatory that no application should be defeated on a technicality for want of form.

The respondent also submitted in the lower court that there was no suit in which the applicant could be substituted or enjoined relying on Mboroki M' Arangacha (supra) case by Honourable Onyancha J, since the suit had abated.

Under Order 24 Rule 1, no suit abates by a party's death if the right survives. Under Rule 2, the death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.

Order 24 Rule 3 (1)(2) of the Civil Procedure Rules states:-

" 3 (1) where one of the two or more plaintiffs dies and the cause of action does not survive or continue to survive plaintiff or plaintiffs alone, or a sole plaintiff or surviving plaintiff dies and the cause of action survives or continues, the court , on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) where within one year no application is made under Subrule (2) the suit shall abate so far as the deceased plaintiff is concerned and on the application of the defendant, the court may award him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff.

Thus where a sole plaintiff dies and the cause of action like the one herein survives or continues, the court on an application made in that behalf, shall cause the legal representative of the deceased plaintiff be made a party in the suit and proceed with the suit. Such application, however, must be made within one year of the death of the plaintiff and in default thereof, the suit abates so far as the deceased plaintiff is concerned.

In this case, the plaintiff died on 16th June 2010 and the application to substitute him was lodged on 24th

February 2012, over one year and eight months. By that time, the suit had abated hence the application to revive the suit which had abated.

The proviso to Order 24 Rule 3 (2) is to the effect that

"Provided the court may, for good reason on application extend the time."

Under Rule 7, (effect of abatement or dismissal.

" where a suit abates or is dismissed under this order, no fresh suit shall be brought on the same cause of action."

Rule 7 (2) allows a personal representative of a deceased plaintiff to apply to court to revive a suit which has abated or to set aside an order of dismissal ***" if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit."***

No doubt, the suit in the lower court had abated one year after the death of the deceased Joseph Mwangi Gitau, since no substitution of his legal representative was done within one year of his death. What therefore remained was of the legal representative to either file an application under Rule 3 (2) for extension of time and or under Rule 7(2) for revival of suit.

The appellant did not seek for leave to extend time within which to file an application required under Order 24 Rule 3(2). She simply sought an order for substitution yet the time for applying for substitution had lapsed within one year of the plaintiff's death. In the application for substitution which was filed out of time without leave of court, she also sought revival of the suit.

In my view, both remedies were and are not available to the appellant for reasons that she did not seek leave for extension of time within which to apply for substitution and secondly, she could not apply for revival of suit before obtaining leave to extend the time for applying to be substituted as it would only be after her application for substitution is allowed that she could now be properly suited to apply for revival of suit which had abated.

The wordings of Order 24 Rules 3 and 7 are clear that " on application" The order does not give the court the power or discretion to act suo moto.

Consequently, the appellant's application was premature and the learned trial magistrate ought to have struck it out and I proceed and strike out the appellant's application for substitution of the deceased plaintiff and for revival of the suit which had abated.

I would not belabor into whether there are good reasons or sufficient cause to allow that application for reasons that the application before court was premature in that no leave of court was being sought to extend the time of filing an application to substitute the deceased plaintiff before the court could even consider whether there was sufficient cause for failure to substitute in time leading to the abatement of the suit.

The upshot of all the above is that this appeal is dismissed in its entirety. Costs are in the discretion of the court. In this case, as it appears that the appellant had not even been enjoined in the suit as a substitute of the deceased plaintiff and having relied on the legal advice of the advocate who, regrettably, did not analyze the provisions of Order 24 before filing the application and this appeal, I shall exercise my discretion and spare her the costs of the application in the lower court and this appeal.

Dated, signed and delivered in open court at Nairobi this 20th day of July 2015.

R.E. ABURILI

JUDGE

20/7/2015

20/7/2015

Coram R.E. Aburili J

C.A: Samuel

No appearance for appellant

No appearance for respondent

Court –Judgment read and delivered in open court in the absence of parties. The Deputy Registrar to serve parties advocates with notice that the judgment has been delivered. The judgment was to be delivered on 13th April, 2015 but the court was on vacation and the Court Assistant, Ms Kavata intimates that she notified the parties of today's date. Matter was also cause listed and posted.

R.E. ABURILI

JUDGE

20/7/2015